

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KERMIT H. KAPELLE (DECEASED)	:	DETERMINATION
AND JOAN A. KAPELLE	:	DTA NO. 815668
	:	
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1987 and 1988.	:	

Petitioners, Kermit H. Kapelle (deceased) and Joan A. Kapelle, 1466 Helderberg Avenue, Schenectady, New York 12306, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1987 and 1988.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brought a motion dated June 2, 1997 seeking summary determination in the above-referenced matter. Petitioners, appearing by Joan A. Kapelle, filed a response on June 28, 1997. Accordingly, the 90-day period for the issuance of this determination under section 3000.5(d) of the Rules began on June 28, 1997. Based upon the motion papers and the response thereto, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioners' refund claims for taxes paid on Federal pension income is barred by the three-year limitations period of Tax Law § 687(a).

FINDINGS OF FACT

1. Based on the affidavit of Charles H. Bellamy, a Tax Technician II for the Division of Taxation ("Division"), petitioners, Kermit H. Kapelle and Joan A. Kapelle, filed a 1987 New York State personal income tax return on or before April 15, 1988 and a 1988 New York State personal income tax return on or before April 15, 1989. On each return, petitioners reported and paid tax on Federal pension income.

2. Petitioners filed claims for refund of personal income tax for the years 1987 and 1988 seeking refunds of the income tax paid on the Federal pension income. The refund claims were filed on or about November 16, 1994. They did not file refund claims or amended returns for these years before November 1994.

3. On or about January 30, 1995, the Division issued a Notice of Disallowance in full for the years 1987 and 1988. The basis of the disallowance was that petitioners did not file a claim for refund within three years of the filing of their returns.

4. Petitioner Joan Kapelle filed a petition which stated that she wished to have a petition on file in case there was a change in the Tax Law regarding petitioners' claim for refund.

5. The Division filed an answer, dated April 24, 1997, which asserted that petitioners failed to file a claim for refund within three years of the filing of the return for the years in issue and that therefore the refund was denied as untimely. The Division further alleged that the "1994 decision to approve refund claims for those who paid New York State income tax on their federal pension income was solely limited to those who had filed timely refund claims under the Tax Law."

6. The Division filed a motion for summary determination dated June 2, 1997. In its motion papers, the Division argued that petitioners failed to file a timely refund claim for the years 1987 and 1988.

7. In her reply papers, Mrs. Kapelle argued that she and her husband never knew that a refund was due for the 1987 and 1988 tax years. They also did not know that there was a time limit for filing a refund claim. Mrs. Kapelle submits that, if they had known, they would have promptly filed a claim for refund. Mrs. Kapelle explains that the Watervliet Arsenal, where her husband was employed, never notified them that a refund was due and they never saw anything in the newspapers or on television. Petitioners learned about the opportunity for a refund when they encountered an individual, who used to work with Mr. Kapelle, in the mall one day. When petitioners learned about the opportunity for a refund, Mrs. Kapelle immediately called a tax preparer for an appointment to prepare a refund claim. Mrs. Kapelle notes that she contacted

Senator Hugh T. Farley and that he stated that taxes were illegally collected from Federal and military retirees. Mrs. Kapelle questions why, if this is the case, she cannot obtain a refund which is due despite the statute of limitations. It is noted by Mrs. Kapelle that she is a widow and that she could utilize the money for property and school taxes. Mrs. Kapelle submits that there should be an exception to the statute of limitations for people who are unaware of their right to a refund.

CONCLUSIONS OF LAW

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b) after issue has been joined. The regulations provide that the motion may be granted if the movant has sufficiently established that no material and triable issue of fact is present, and the motion may be denied "if any party shows facts sufficient to require a hearing of any material and triable issue of fact" (20 NYCRR 3000.9[b][1]). From the motion papers, it is apparent that there are no material or triable issues of fact in dispute. Therefore, the legal issues may be decided on this motion.

B. In Davis v. Michigan Dept. of Treasury (489 US 803, 103 L Ed 2d 891), the United States Supreme Court held that a tax scheme that exempts from tax retirement benefits paid by the state but not retirement benefits paid by the Federal government is unconstitutionally discriminatory. In Harper v. Virginia Dept. of Taxation (509 US 86, 125 L Ed 2d 74), the U.S. Supreme Court further held that the ruling in Davis applied retroactively and that states which violated the tax immunity doctrine must provide "meaningful backward-looking relief to rectify any unconstitutional deprivation" (id. at 101, 125 L Ed 2d at 89, quoting McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 US 18, 31, 110 L Ed 2d 17, 32). A state may provide such relief by awarding refunds to those illegally taxed or by providing some other relief that "create[s] in hindsight a nondiscriminatory scheme" (McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra at 40, 110 L Ed 2d at 38).

Soon after the Davis decision, on July 21, 1989, the Legislature amended Tax Law § 612(c)(3) to place pensions paid to Federal retirees in the same position as pensions paid to

State and local retirees. The Legislature declared that the amendment was to take effect "immediately and shall apply to federal pension benefits received in taxable years beginning on or after January 1, 1989" (L 1989, ch 664, §§ 1-3). Thus, in response to the Davis and Harper decisions, the State amended the statute to conform to the rulings.

C. Tax Law § 687 provides, in pertinent part, that:

"(a) General. -- Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later

* * *

"(e) Failure to file claim within prescribed period. -- No credit or refund shall be allowed or made . . . after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article."

D. The scheme presented by the State satisfies the Due Process Clause of the 14th Amendment by providing "meaningful backward-looking relief to rectify any unconstitutional deprivation" (McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, supra at 31, 110 L Ed 2d at 32). Tax Law § 687(a) adequately meets the requirements set out in McKesson which provides that a state "might provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint. . . ." (McKesson v. Division of Alcoholic Beverages & Tobacco, supra, at 45, 110 L Ed 2d at 41.) These procedural requirements address the State's obligation to refund the unconstitutionally collected funds while at the same time satisfying the State's need for sound fiscal planning (see, Matter of Burkhardt, Tax Appeals Tribunal, January 9, 1997).

E. In Matter of Jones (Tax Appeals Tribunal, January 9, 1997) the Tax Appeals Tribunal rejected a similar refund claim because it was filed by a Federal retiree beyond the statute of limitations. In reaching this decision the Tribunal stated:

"We refuse to impose on the Division the duty of personally advising every taxpayer who is potentially subject to a refund of his or her right to such a refund because of a change in the law given the State's constitutionally sound scheme which 'rectified any unconstitutional deprivation' (Harper v. Virginia Dept. of

Taxation, supra) while simultaneously respecting the State's fisc (McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, supra).

"In addition, we note that on November 6, 1989, the Division did issue a Technical Services Bureau memorandum to the public which informed taxpayers of their right to file protective refund claims during the pendency of two cases dealing with the issue of whether Davis v. Michigan Dept. of Treasury (supra) was to apply retroactively (see, TSB-M-89[9]I). Hence, although petitioner was placed on notice of his right to file protective refund claims, he chose not to exercise said right."

F. On the basis of Jones, petitioners' argument is rejected. The statute of limitations is not tolled because petitioners did not know until after the statute of limitation had passed that taxing Federal pensions in New York was illegal.

G. The Division's of Taxation's motion for summary determination is granted and the petition of Kermit H. Kapelle (deceased) and Joan A. Kapelle is denied.

DATED: Troy, New York
September 18, 1997

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE